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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GUILLERMO TORRERO et al.,

Plaintiffs and Appellants,

v.

FRANK GONZALEZ, Individually and as
Trustee, etc.,

Defendant and Respondent.

B198864

(Los Angeles County
Super. Ct. No. BC344253)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Law Office of Steven P. Scandura and Steven P. Scandura for Plaintiffs and Appellants.

Sterzer & Associates and Richard J. Radcliffe for Defendant and Respondent.

Guillermo Torrero and Esperanza Sidar, husband and wife, appeal from the trial court's judgment awarding them \$106,989.67 in their wage and hour suit. Torrero and Sidar lived in the home of Tom Soto and his wife Lucy Soto, and cared for the elderly couple for most of 2004. On appeal, they argue (among other claims) that they are due more compensation. Because we conclude that the trial court correctly applied the law, we affirm.

BACKGROUND

The trial court issued a 15-page single-spaced statement of decision, including a statement of facts which appellants do not dispute and which we summarize as follows.

Tom and Lucy Soto ("Tom" and "Lucy," collectively "the Sotos"), married since 1947, owned their home in Montebello, California outright.¹ They lived on Tom's Veterans Affairs pension and the couple's social security stipends. In late 2003, Lucy broke her leg and emergency personnel had to break into the home and take her to the hospital. A social worker checked on the Sotos from time to time.

In 2003, Sidar, who speaks only Spanish, was working putting stickers on clothing through Labor Ready, an employment service. At the end of the year, Sidar learned from a friend that the Sotos needed a housecleaner for four hours, and on December 30, 2003, she cleaned the Sotos' home, still working through Labor Ready. Lucy was bilingual in Spanish and English and liked Sidar's work. Lucy asked her to return to work for \$10 an hour, and on December 31, Sidar came back and cleaned all day. That same day, Tom was discharged from a convalescent home. Sidar went with Lucy to pick him up. Tom was confused and dizzy, falling when he tried to get out of bed, and Lucy asked Sidar to watch him. Sidar agreed.

At 4:30, Torrero arrived after work to pick Sidar up. Lucy asked them both to spend the night and help her look after Tom, offering to pay Torrero \$100. He agreed.

¹ In 2005, the house was valued at approximately \$600,000.

Sidar and Torrero slept outside of Tom's bedroom, and Torrero took Tom to the bathroom when he got up during the night. Torrero received the promised \$100.

The next day, January 1, 2004, Lucy asked the couple to stay. Lucy, Sidar, and Torrero reached an oral agreement that Lucy would pay Sidar and Torrero each \$10 per hour. Neither Sidar nor Lucy notified Labor Ready that Sidar would continue to work for the Sotos.

Sidar and Torrero stayed at the Sotos' home. Initially, Sidar took care of Tom, who was incontinent and needed help getting to the bathroom and being changed. Lucy soon became ill as well, frequently calling for help at night, and needing her perspiration-soaked clothes changed twice a day. For most of 2004, Sidar cleaned the house, did the laundry, and washed, changed, and kept an eye on Tom and Lucy. She fed them by cooking and buying takeout. Torrero ran errands, drove the Sotos to their doctor's appointments, and watched Tom. Although at first Torrero worked full-time at a frozen food company, by the end of February 2004, Tom asked Torrero to work full-time for the Sotos, and Torrero quit his job.

Lucy fell behind in paying Sidar and Torrero. When Sidar spoke to Lucy about it, Lucy said she would get the money from the bank. Meanwhile, in early 2004, Lucy called her cousin Frank Gonzalez, a retired Riverside County deputy sheriff, and told Gonzalez she was unhappy with the care provided by Sidar and Torrero. Gonzalez came to the Sotos' home to investigate. When he asked Sidar and Torrero to provide identification, they refused, and the couple also would not fill out a job application. Lucy told Gonzalez that she had a direct agreement with Sidar to care for her. Gonzalez testified that Lucy did not have any agreement with either Sidar or Torrero to care for Tom. Tom, who seemed disoriented, did not talk to Gonzalez, and Gonzalez never saw Torrero care for either Tom or Lucy.

Lucy asked Sidar and Torrero not to leave and said she would go to the bank to get money to pay Sidar, but she did not. Both Sidar and Torrero (Torrero cleaned the garage and painted part of the house) continued to work, expecting to be paid eventually. Gonzalez told them they would receive their wages and expenses.

Gonzalez, through an attorney, set up the Lucy Soto Living Trust in March 2004 (Tom was not involved) and after Gonzalez obtained a doctor's letter stating that Lucy was mentally incapacitated, Gonzalez became the successor trustee with the authority to decide Lucy's medical issues. Gonzalez then transferred \$80,000 of Tom and Lucy's money and the title to the house to the Trust, leaving \$10,000 in cash for Tom. From the Trust account, Gonzalez paid the bills through March 2004 and wrote checks to Sidar in April and May for her services and for expenses. Sidar told Gonzalez that Lucy had agreed to pay her \$500 a week, and Gonzalez paid her that amount until May 2004.

Gonzalez testified that Sidar never asked for more and Torrero never asked for payment. Sidar, however, testified that she asked Gonzalez for \$10 an hour and that he refused. She accepted the \$500 weekly payment because she knew there was no more money. Gonzalez paid only for Lucy's care; he did not think Tom was his responsibility.

Torrero testified that Gonzalez offered him \$1 an hour, which he declined, and that Gonzalez purported to fire him. By the end of April 2004, however, Tom had signed powers of attorney designating Torrero to make his health and financial decisions, and Torrero had full control of Tom's finances. Torrero opened a joint checking account with Tom and had the remaining \$10,000 and Tom's pension payments deposited into the account to pay the monthly bills. Torrero used the account to pay Sidar's medical expenses when Sidar hurt her arm lifting Lucy.

Meanwhile, in May 2004, Gonzalez moved Lucy into assisted living after investigating 35 locations. Lucy had lost 30-35 pounds and weighed only 68 pounds. On May 28, Gonzalez wrote a letter to Sidar terminating her services and wrote her a final check on June 1, 2004.

The couple stayed in the Sotos' home and Torrero, through his power of attorney, paid Sidar \$300 per week from Tom's account to take care of Tom. Torrero did not pay himself. Tom told the couple he would pay them and to wait for the will. The social worker visited the home in June 2004 and found Tom alert but forgetful.

Tom's family visited in September 2004 and found the house was not well kept. There was conflict and mutual mistrust between the family and Sidar and Torrero. In

early October 2004, the family created the Tom Soto Living Trust, which made them trustees, and convinced Tom to sign. After research, the family placed Tom in a nursing facility on December 15, 2004. Tom showed signs of dementia and slept nearly all the time.

Sidar and Torrero left the Soto home on December 17, 2004 after living there for nearly a calendar year. Lucy, who had gained most of her weight back, died in the spring of 2005. In all, Sidar and Torrero received \$21,330 in wages and reimbursement for their care of the Sotos. They had received free room and board, and although Torrero kept track of receipts, the couple did not keep records of their hours worked.

In February 2005, Sidar and Torrero filed a complaint with the California Labor Commission, whose employees calculated Sidar's unpaid wages as \$90,030 and Torrero's as \$55,260. Sidar and Torrero later filed suit in superior court under the Labor Code against Tom Soto, the Tom Soto Living Trust, and Frank Gonzalez individually and as trustee of the Lucy Soto Living Trust.² The second amended complaint, filed in May 2006, alleged (among other claims) breach of an oral agreement, promissory estoppel, and negligent and intentional misrepresentation, and requested lost wages, waiting time penalties, and general and punitive damages. The complaint's theory was that Sidar and Torrero were entitled to payment for 24 hours a day, including overtime, double time, penalties, and interest.

After a three-day court trial, the court issued a written statement of decision on January 18, 2007. The court denied Sidar's and Torrero's posttrial attempt to amend to include a claim for fraudulent conveyance. The court found that both Sidar and Torrero worked at the Sotos' home until December 15, 2004 and that the couple, while untrained and not the best of caregivers, treated the Sotos honestly. The trial court attributed 14 hours per day of work to Sidar, at \$10 an hour until May 28, 2004, when Gonzalez terminated her in writing and Lucy was placed in the assisted living facility. After that

² The second amended complaint also named as defendants "the Estate of Lucy Soto" and various individuals associated with the Tom Soto Living Trust.

date, the court concluded that Sidar was entitled to the \$300 per week that Torrero paid her out of Tom Soto's money, until December 15, 2004.

As for Torrero, the court found that he too had an oral agreement with Lucy Soto for payment at \$10 an hour. Until Torrero quit his job at the frozen food company, the trial court found Torrero worked for the Sotos 5 hours each weekday and 14 hours each weekend day. After March 1, 2004, when Torrero no longer worked outside the Sotos' home, the court concluded that he worked for the Sotos 14 hours a day until Lucy left on May 28, 2004. After that date, as a fiduciary for Tom Soto (due to his power of attorney), Torrero was not entitled to additional compensation.

The trial court also found that Sidar's acceptance of \$300 per week after May 28, 2004 was not a partial payment for her services; that Sidar and Torrero had not shown that the arrangement violated minimum wage laws; and that the \$21,350 paid to Sidar and Torrero should be offset from the amounts owed. Concluding that Gonzalez, as trustee of the Lucy Soto Living Trust, ratified Lucy's agreement with Sidar, the court found the Lucy Soto Trust was liable for Sidar's wages until Gonzalez terminated her in May 27, 2004. Because Gonzalez never ratified Lucy's agreement to pay Torrero, neither he nor the Lucy Soto Trust was liable to pay for Torrero's services. Tom Soto was personally liable for the cost of Sidar's care of Lucy until Sidar was fired, because it was a marital obligation. After Sidar's firing on May 28, 2004, Tom was personally liable for Sidar's wages through her employment agreement with Torrero, who had a power of attorney from Tom when he agreed to pay Sidar \$300 per week.

The court asked the parties to calculate the couple's wages for the period of time before May 28, 2004 (the date the oral agreement with Lucy ended when Gonzalez terminated Sidar) with a base rate of \$10 per hour (including overtime, double time, and penalties). After May 28, 2004, Sidar's salary was to be calculated as \$300 per week. The amounts were to be entered as: "(1) the January 1 through May 28 amount for Sidar against Gonzalez as trustee of the Lucy Soto Trust, (2) the January 1 through May 28 amount for both Plaintiffs against Tom only, (3) the May 28 through December 15 amount for Sidar against Tom only, and [(4)] the October 1, 2004 through December 15

amount for Sidar against the Tom Soto Trust.” The court directed the parties to deduct from the total amount the \$21,350 already received, and any money used to pay Sidar’s medical bills, and the rent on Sidar and Torrero’s apartment.³ Sidar and Torrero filed objections to the statement of decision.

The court filed its judgment on March 6, 2007, awarding Sidar a total of \$67,654.02 (unpaid wages, interest, and penalties less a credit) against Tom Soto, the Tom Soto Trust, and the Lucy Soto Trust (with Frank Gonzalez as successor trustee). The court awarded Torrero a total of \$39,425.65 against Tom Soto (unpaid wages, interest, and penalties). Gonzalez was not personally liable. Sidar and Torrero’s attorneys were entitled to reasonable attorneys’ fees and costs. No party moved for a new trial.

Sidar and Torrero filed a notice of appeal. They subsequently settled with Tom Soto, the Tom Soto Living Trust, and Tom Soto’s relatives. The only respondent in this appeal is Gonzalez, individually and as successor trustee of the Lucy Soto Living Trust.

ANALYSIS

I. Sidar and Torrero cannot challenge the amount of the award because they did not file a motion for new trial.

Sidar and Torrero argue on appeal that Sidar actually worked 24 hours a day for the Sotos, beginning January 1, 2004 and continuing for 49 weeks. They contend that beginning January 1, 2004, Torrero actually worked for the Sotos every hour he was not at his other job, and that after he quit his outside job 8 weeks later, he too worked 24 hours a day for the Sotos for 41 weeks. Their brief includes a table calculating the wages

³ Torrero and Sidar lived in an apartment before they moved in with the Sotos, and Torrero’s brother lived with them and paid half the rent. Torrero paid their half of the rent on the apartment from the joint account he held with Tom Soto when he had Soto’s power of attorney.

due, with overtime and double-time.⁴ Including penalties, Sidar and Torrero demand \$130,284 and \$124,884 respectively for the year they lived with the Sotos. For Sidar, that is roughly twice the amount awarded by the trial court; for Torrero, it is more than three times the trial court's award.

“A failure to timely move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court. [Citation.] The power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court. [Citation.] Thus, a party who first challenges the damage award on appeal, without a motion for a new trial, unnecessarily burdens the appellate court with issues that can and should be resolved at the trial level. [Citation.] Consequently, if ascertainment of the amount of damages turns on the credibility of witnesses, conflicting evidence, or other factual questions, the award may not be challenged for inadequacy or excessiveness for the first time on appeal.” (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719-720; see *County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1121.)

This rule applies to the wage award. The parties took conflicting positions regarding Sidar and Torrero's agreement with the Sotos and their duties in the Sotos' home. The trial court based its award on its factual finding regarding the number of hours worked by Sidar and Torrero, after hearing testimony by the parties, assessing their credibility, and carefully weighing the conflicting evidence presented during three days of trial. Sidar and Torrero are precluded from challenging the amount of wages awarded to them because they did not timely move for a new trial. (*Jamison v. Jamison, supra*, 164 Cal.App.4th at p. 720.) The wage award, like a damages award assessing fault or unlawfulness, “still requires an evaluation of the amount awarded in light of the evidence presented at trial, an issue that can and should be resolved at the trial court level.” (*Ibid.*)

⁴ The record includes a similar table that Sidar and Torrero attached to a posttrial motion.

Sidar and Torrero argue that they were not required to move for a new trial because they filed posttrial motions. Their posttrial motions, however, were rearguments of their contention that Sidar and Torrero were entitled to be paid for every hour of every day, made in advance of the trial court's ruling and in objections to the court's statement of decision, and do not eliminate the requirement of a motion for a new trial on the amount of damages.

Because Sidar and Torrero did not move for a new trial on the ground of an inadequate wage award, they cannot challenge the amount of the award on appeal.⁵

If Sidar and Torrero had preserved their challenge to the wage award, however, we would affirm. The trial court's statement of decision was supported by substantial evidence (as we conclude in more detail below), and we perceive no error in its judgment awarding wages of \$67,654.02 to Sidar and \$39,425.65 to Torrero based on the statement of decision.

II. Sidar and Torrero do not show legal error and substantial evidence supports the trial court's factual findings.

To the extent that Sidar and Torrero argue that the court's award of wages for less than 24 hours a day was legally incorrect, we disagree. They cite *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, but that case is not in their favor. The

⁵ Sidar and Torrero also argue that the offer of \$1 per hour to Torrero by Gonzalez violated state minimum wage laws, apparently on the theory that when Torrero refused to accept the offer, Gonzalez fired him. But around the time of the offer, Lucy was gone, ending any agreement to take care of her, and Torrero obtained power of attorney over Tom Soto's financial affairs. The trial court concluded that his right to pay ended when he became a fiduciary, as it would have been improper for Torrero to reimburse himself. And the further argument that it violated minimum wage to pay Sidar \$300 per week after Lucy was no longer in the home ignores that the weekly payments were determined and made by *Torrero* to Sidar, pursuant to Torrero's power of attorney, out of Tom's account after Gonzalez terminated Sidar's employment with Lucy. This purported underpayment cannot be attributed to Gonzalez, individually or as trustee of the Lucy Soto Trust.

court of appeal held that under a former wage order of the California Industrial Welfare Commission, employees (in *Aguilar*, personal attendants) who “work less than 24-hour shifts and have a home elsewhere” must be compensated for their sleep time, while those working 24-hour shifts are not entitled to payment. (*Id.* at pp. 33-34.) Sidar and Torrero, who resided with the Sotos and contend throughout that they worked 24-hour shifts, do not show how under *Aguilar* they would be entitled to compensation for sleep time. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 583-584, fn. 4 [“The *Aguilar* court did not consider the provision regarding an employee who resided at the premises There is no indication that employees in *Aguilar* were required to reside at the employer’s premises”].)

Sidar and Torrero also rely on *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403. In *Madera*, the California Supreme Court held that whether on-call meal breaks for police personnel were “hours worked” depended on a factual determination: were the breaks substantially restricted for the employer’s purposes, and were the employees able to pursue private pursuits? (*Id.* at pp. 409-410.) *Madera* does not involve live-in employees on 24-hour shifts. Further, the trial court in this case made the factual determination that Sidar and Torrero were not under the Sotos’ control 24 hours each day.

Sidar and Torrero cite IWC Wage Order 15, which governs household employees. The Wage Order states that live-in employees are entitled to “[a]t least twelve (12) consecutive hours free of duty during each workday of twenty-four (24) hours” and overtime pay when they were “required or permitted to work during scheduled off-duty hours or during the twelve (12) consecutive off-duty hours” (Cal. Code Regs., tit. 8, § 11150, subd. 3(A)(2).) Sidar and Torrero argue that this entitles them to overtime compensation for “the balance of the 24-hour period, each day.” This ignores the trial court’s finding that they did receive compensation for overtime that they worked while they lived with the Sotos. The trial court found, based on substantial evidence, that Sidar and Torrero were not under the Sotos’ control for every hour of every day. The Wage Order defines “hours worked” as “the time during which an employee is subject to the

control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” (Cal. Code Regs., tit. 8, § 11150, subd. 2(H).) Wage Order 15 does not require compensation for more than the hours that the trial court found Sidar and Torrero were under the control of the Sotos.

Sidar and Torrero claim to accept the facts as found in the statement of decision, but they continue to present a version of their duties in the Sotos’ home which conflicts with the court’s factual findings. Their brief on appeal disputes core parts of the statement of decision in what amounts to an argument that the findings are not supported by substantial evidence. For example, they argue that they were “on duty” at the Sotos’ home 24 hours each day and were hired to take care of the Sotos on a 24-hour basis. The trial court concluded, to the contrary, that there was no agreement between the Sotos and either Sidar or Torrero on the number of hours to be worked, and that neither actually was on duty 24 hours each day. Sidar and Torrero cast aspersions on the Sotos’ relatives, including Gonzalez, and argue that the trial court’s wage calculation is “downright evil, unjust, extremely cold-hearted, and morally indefensible.” To the contrary, the trial court was scrupulously detailed in its evaluation of the evidence presented to it and awarded a substantial amount including overtime and double-time wages. Credibility determinations regarding witness testimony are within the trial court’s purview and substantial evidence supported its conclusions. (*Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 1150, 1155.)

III. Lucy Soto and the Lucy Soto Living Trust Are Not Liable for Tom Soto’s Obligations.

The trial court concluded that Frank Gonzalez and the Lucy Soto Living Trust were not liable for Torrero’s wages because the Trust (with Gonzalez as trustee) never ratified Torrero’s agreement with Lucy to pay \$10 per hour for the care of Tom.⁶

⁶ The court concluded that Tom was personally liable for Sidar’s wages (as his spouse’s, Lucy’s, contractual obligations), and for Torrero’s \$300 weekly payments to Sidar (which were made with Tom’s power of attorney).

Gonzalez testified that he did not agree to pay Torrero \$10 per hour; Torrero testified that Gonzalez offered him \$1 per hour and that he refused. Substantial evidence supports the conclusion that the Lucy Soto Living Trust, through its trustee Gonzalez, neither agreed nor ratified the earlier agreement to pay Torrero \$10 per hour.

Although he made this argument in the trial court as to the estate of Tom Soto, Torrero argues for the first time on appeal that Lucy Soto, who had died by the time the complaint was filed, is personally liable for his wages, because one spouse is liable for debts incurred by the other under Family Code section 914. Because he did not make that argument in the trial court, he has waived it. (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381.) Further, while he named “the Estate of Lucy Soto” as a defendant, he never filed a claim against the estate in probate court. (See Prob. Code, §§ 9002, 9351.)

IV. The trial court did not abuse its discretion in denying the motion to amend the complaint.

On the third day of trial, Sidar and Torrero’s counsel moved to amend the pleadings to allege that the conveyance of Tom Soto’s assets to the Tom Soto Living Trust was a fraudulent conveyance. In a posttrial motion, they argued that Gonzalez had transferred the \$80,000 and the Soto home⁷ into the Lucy Soto Living Trust to avoid creditors (namely, Sidar and Torrero), making the transfer fraudulent under Civil Code section 3439.04. The trial court denied the motion to amend because there was no evidence that the transfer was made to avoid creditors.

We review the denial of the posttrial motion to amend the complaint for an abuse of discretion, and Sidar and Torrero have the burden to show that the court abused its discretion. (*Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130

⁷ The home was later re-transferred to the Tom Soto Living Trust, and up to the date of the court’s statement of decision, the money used from the Trust was for Tom’s care. Gonzalez transferred \$40,000 of the \$80,000 he had deposited in the Lucy Soto Living Trust into the Tom Soto Living Trust after its formation.

Cal.App.4th 1078, 1097.) The trial court was well within its discretion to deny the amendment, as the evidence at trial did not show fraudulent intent in the transfer of the assets.

DISPOSITION

The judgment is affirmed. Gonzalez is awarded his costs on appeal.

NOT TO BE PUBLISHED

WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.